

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF SHORELINE
PERMITS ISSUED BY MASON COUNTY
TO SWECKER SEA FARMS,

CLEAN UP SOUTH SOUND ("CUSS"),

Appellant,

and FRANK DOLESHY,

Intervenor-Appellant,

v.

DANIEL P. SWECKER, SWECKER SEA
FARMS, MASON COUNTY and State
of Washington, DEPARTMENT OF
ECOLOGY,

Respondents,

and

DEPARTMENT OF AGRICULTURE and
DEPARTMENT OF NATURAL RESOURCES,

Intervenors-Respondents.

SHB No. 88-38

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

1 This matter is the appeal from Mason County's issuance, and the
2 Washington State Department of Ecology's subsequent approval, of
3 shoreline substantial development and conditional use permits, for a
4 42 pen floating salmon aquaculture facility in Case Inlet near Dana
5 Passage, Puget Sound, west of Hartstene Island.

6 The hearing was held before the Shorelines Hearings Board
7 ("Board"), Members Judith A. Bendor, presiding; Wick Dufford,
8 Chairman; Harold S. Zimmerman, Nancy Burnett, Les Eldridge and Gordon
9 F. Crandall, on April 7, April 10-14, and April 24-26, 1989, in Lacey,
10 Washington and Seattle, Washington, with the matter concluded on May
11 10, 1989, with written argument. The hearing was officially reported
12 by Gene Barker and Associates. The Board viewed the site and vicinity
13 with the parties on April 7, 1989.

14 Earlier, on March 6, 1989, after motions practice, this Board
15 orally granted partial summary judgment in respondent Swecker's favor
16 on the following issues:

- 17
- 18 (a) Proper notice of the application was given under the
SMA, MCSMP and SEPA;
 - 19 (b) No variance was required under the SMA or MCSMP;
 - 20 (c) The SEPA Addendum was properly issued and circulated;
and
 - 21 (d) The Board had no jurisdiction to review appellant's
contention that an NPDES permit was required.

22 The Board further ruled that the issue regarding the DNS appeal heard
23 by Mason County on May 31, 1988 was not an issue requiring a remand to
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1 Mason County. The rulings are confirmed by written order issued on
2 this day.

3 At the hearing, appellant Clean Up South Sound ("CUSS") appeared
4 pro se through Jerome Rauen and Ernest Chaffee. Intervenor-Appellant
5 Frank Doleshy appeared pro se. Respondent Daniel P. Swecker and
6 Swecker Sea Farms, Inc. ("Swecker") were represented by attorneys
7 Thomas A. Goeltz and Richard W. Elliot of Davis Wright and Jones
8 (Seattle). Intervenor-Respondent Department of Agriculture was
9 represented by Betty Edwards, Assistant Attorney General.
10 Intervenor-Respondent Department of Natural Resources was represented
11 by Jay Geck, Assistant Attorney General. Party respondent Department
12 of Ecology represented by Allen T. Miller, Jr., Assistant Attorney
13 General, and respondent Mason County represented by Michael Clift,
14 Deputy Prosecuting Attorney, did not appear at the hearing.

15 Opening statements were made. Witnesses were sworn and
16 testified. Exhibits were admitted and examined. By agreement of the
17 parties, final argument was presented orally by respondent Swecker on
18 April 26, 1989, in writing by appellants on May 5, 1989, with written
19 rebuttal on May 10, 1989. From the evidence and contentions, the
20 Board makes these

21 FINDINGS OF FACT

22 I

23 On January 25, 1988, respondents Swecker applied to Mason County
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1 for approval under the State Shoreline Management Act ("SMA") and the
2 Mason County Shoreline Master Program ("MCSMP") for the construction
3 and operation of a floating net pen facility for the commercial
4 rearing of Atlantic salmon. The project's location is in lower Case
5 Inlet adjacent to Dana Passage, southeast of Hartstene Island 745 feet
6 offshore (at mean high water).

7 II

8 The surrounding marine waters are classified as shorelines of
9 state-wide significance, and are designated in the MCSMP as a "Natural
10 Environment" as are all marine waters of 10 fathoms or more. This
11 designation allows aquaculture such as net pens, subject to
12 satisfaction of conditional use permit criteria .

13 III

14 Mason County issued and circulated a declaration of
15 nonsignificance ("DNS") on the project after proper notice. See
16 Order. Written comments were received. After receiving further
17 information from the applicant, Mason County issued and circulated a
18 SEPA Addendum setting forth 15 project conditions. The Mason County
19 Board of Commissioners upheld the DNS after an appeal hearing on May
20 31, 1988.

21 IV ,

22 On July 19, 1988, the Mason County Board of Commissioners
23 approved issuance of the shoreline substantial development and
24

1 conditional use permits. In doing so, they added a 16th permit
2 condition. These 16 conditions are:

- 3 1) To reduce impacts to water quality, all fish-kill wastes
4 including blood and mortalities shall be collected, prevented
5 from entering the water and then transported to an approved
6 land-based disposal of processing site. Disposal plan shall be
7 approved by Mason County prior to issuance of shoreline permit.
- 8 2) Fish processing shall not be permitted at the floating net
9 pen site.
- 10 3) To minimize potential for spills into Puget Sound, storage
11 of hazardous material, chemicals and antibiotics shall not be
12 permitted on the warming hut. One Coast Guard approved ten
13 gallon fuel tank will be permitted, provided this allowance shall
14 not be construed to allow storage of any other petroleum or
15 hazardous products.
- 16 4) Use of the warming hut shall be limited to activities
17 directly related to the project. Modifications, additions or
18 expansion of the hut shall not be permitted.
- 19 5) All chemical and fish medication use must be reviewed and
20 approved by Mason County Health Department prior to use on
21 project.
- 22 6) Daily physical and chemical measurements of water quality
23 shall be taken and shall include but not be limited to salinity,
24 water temperature, dissolved oxygen, secchi disc visibility, and
25 sea state. Monthly or quarterly summaries of this monitoring
26 program shall be provided to Mason County Health Department.
- 27 7) A noise assessment of the project area indicating noise
levels of pre- and post-installation of the net pens shall be
provided to the Planning Department prior to shoreline permit
issuance.
- 8) Construction-related noise shall be minimized by off-site
construction to the extent possible.
- 9) No permanent generator shall be allowed.
- 10) No amplified devices including loud speakers, radios or tape
players shall be allowed at the project site.

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- 11) Water pumps will use better-than-original mufflers.
- 12) Water pump use will be limited to between the hours of 8 a.m. and 5 p.m.
- 13) Warming hut windows shall be shaded.
- 14) The warming hut shall be angled relative to the shoreline and painted with colors to lessen visual effects.
- 15) Only non-lethal means of predator control shall be allowed.
- 16) Littoral drift and sedimentation rate to be monitored over a five-year period following completion of the project with an initial baseline survey. Annual reports to be submitted to Mason County Planning to their satisfaction. If negative alterations of the existing beach conditions resulting from the project occur to adjacent landowners, corrective action to rectify negative impacts will be required of the applicant.

On August 25, 1988, DOE approved the County's conditional use permit. Appellant CUSS timely appealed the permits to this Board, which appeal became our SHB NO. 88-38.

V

The project consists of 42 net pens, each 40 feet square by 20 feet deep, oriented in a two-row, straight-line alignment running parallel to the shoreline in a northeast to southwest direction. The alignment of net pens and walkways are 96 feet by 900 feet, covering 2 acres of surface water within the protective booms, and 2.59 acres within the outer buoys.

The project is limited to an annual production of 860,000 pounds of salmon per year.

1
2 VI

3 In addition to the net pens, there will be a work hut on a 25
4 foot by 40 foot by 1 1/2 foot high work barge (aka "warming hut").
5 The hut is 10 feet wide by 25 feet deep and 8 1/2 feet high. The hut
6 will be 10 feet above water and angled to the shore. There will be a
7 handrail around the pens which is four feet high. Natural colors will
8 be used to minimize visual impact. No amplified sound devices will be
9 allowed, including radios.

10 VII

11 Access to the facility will be from Zittel's Marina in Thurston
12 County. Small barges (15 feet by 30 feet) will be used for
13 transporting fish feed and other supplies. These work barges will be
14 moored off-site at the marina.

15 At full production, approximately 20 people will work at the site
16 during the day. For security reasons, a worker will be at the site 24
17 hours a day. The remainder of the work force will be daily
18 transported in small boats or work barges from the marina. No new
19 construction or facilities are required at the marina to accommodate
20 the Swecker net pen operation. Between April and June of each year,
21 young Atlantic salmon (smolts) will be transported by truck from
22 Swecker's existing fresh water fish farm located in Rochester,
23 Washington to the marina, where they will be transferred by boat or
24 barge for delivery to the net pens.

VIII

At the facility, the fish will be hand-fed with semi-moist pellets, unless automatic feeding produces a better food conversion ratio. U.S. Food and Drug Administration approved antibiotics will be used to control bacterial infections (see Finding of Fact XIX, below).

IX

The fish will be harvested after an average of 18 months in the net pens and will be killed on-site. Mason County has required that all fish-kill wastes, including blood and mortalities, be collected, prevented from entering the water and transported away from the marine waters. These wastes have economic value and the permittee intends to sell them for manufacture of fish feed and other uses. Fish processing is prohibited at the net pen facility, and instead will be done at Swecker's existing fish processing facility in Tumwater, Washington, Thurston County.

X

Non-lethal predator control will be used consisting of a second, larger mesh net surrounding each individual net pen. This will keep out underwater predators. Netting also will be stretched tightly over the tops of the net pens to protect the fish from birds.

XI

Appellants have not demonstrated that there is likely to be significant escapement of salmon.

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XII

An established market exists for the sale of net pen salmon like those which the facility will produce. The proposal has the potential for success if operated properly.

If the venture is unsuccessful, the DNR permit will require that the structures be removed and a bond to so ensure will be required.

XIII

The evidence before us on areas of concern can be classified into major subject headings: (1) water quality and aquatic biology; (2) fish diseases and antibiotic use; (3) aesthetics, noise and odor; and (4) navigation and use conflicts.

Water Quality and Aquatic Biology

XIV

The Recommended Interim Guidelines for the Management of Salmon Net-Pen Culture in Puget Sound (December 30, 1986; "Interim Guidelines") recite:

It is the opinion of state agencies that those facilities sited and operated in accordance with these guidelines will result in little or no adverse environmental effects within those areas of potential impact addressed by the guidelines. [Ex. R-33, at p.1]

We note that the Interim Guidelines have not been adopted as formal state regulations. We, nonetheless, find them to be persuasive in the context of the evidence as presented in this particular case.

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The site was selected in part due to its favorable circulation and flushing. Dana Passage is one of Puget Sound's major mixing zones (along with Admiralty Inlet, the Narrows, Nisqually Reach and Deception Pass).

The mean current at the site is 16 centimeters per second (.3 knots). This is three-fold larger than the minimum speed enumerated in the Interim Guidelines (.1 knots).

The depth at the site is 114 feet (at mean high water), with 94 feet beneath the bottom of the pens. This is approximately 1-1/2 times greater than the minimum depth of 60 feet enumerated by the Interim Guidelines. Soluble substances from the net pen facility will be dispersed over a considerable distance after a full tidal cycle of 12 hours. A portion of the soluble waste generated during the flood tide will enter a vigorous gyre located in the basin west of Dana Passage.

Appellants have not demonstrated that the project will significantly adversely affect water quality.

XVI

Paralytic shellfish poisoning (PSP) is caused by one species of phytoplankton, a dinoflagellate called Gonyaulax Catenella, which can be fatal to humans who eat shellfish containing PSP toxin.¹ PSP

¹ PSP has sometimes been called Red Tide. This is an incorrect description as not all red blooms contain the GC dinoflagellate.

1 toxins have been found in shellfish in Carr Inlet at levels above the
2 Department of Social and Health Services' level, requiring closure of
3 shellfish beaches. These levels were reported for the first time
4 south of Tacoma Narrows in the fall of 1988.

5 Fish in net pens release nitrogen and phosphorous into the
6 aquatic environment from their urine, waste feed, and to some extent
7 from their feces.

8 XVII

9 The extent to which net pen nitrogen might stimulate or sustain
10 phytoplankton blooms varies with the nitrogen concentration existing
11 at the site before net pens are added. Higher nitrogen
12 concentrations, if already in existence, would fulfill most or all of
13 the phytoplankton's capacity to use it. Therefore, in such
14 circumstances, addition of nitrogen from net pens would not further
15 affect the phytoplankton. Conversely, low background concentrations
16 of nitrogen may not fulfill that capacity and the increment added by
17 net pens could then have a growth-inducing effect on phytoplankton.

18 Appellants have not demonstrated that ambient levels of nitrogen
19 near the site are sufficiently low such that the net pens' addition of
20 nitrogen will stimulate or exacerbate phytoplankton blooms.
21 Additionally, stratification of the water column which can enhance
22 blooms, has not been shown to occur due to the strong currents and
23 mixing.
24

1 Appellants advanced a theory that phosphorous from the net pens
2 will cause or exacerbate phytoplankton blooms in this fresh water
3 environment. However, they conceded that their theory was "purely
4 speculative".

5 In sum, appellants have not proven that the net pens will cause
6 or exacerbate phytoplankton blooms, either toxic or nontoxic.

7 XVIII

8 The net pens will release approximately 550,000 pounds annually
9 of solid waste in the form of fish feces and uneaten fish food.
10 Accumulations are estimated to occur within approximately 660 feet to
11 the south and southwest, and about 330 feet in other directions.
12 Maximum accumulation will be in the range of 5.0 cm to 2.0 cm, (2" to
13 8/10") directly below the pens, 330 feet to the south and southwest,
14 and about 115 feet in other directions. Some changes in the benthic
15 community are likely to occur, particularly in the area of maximum
16 accumulation, favoring benthos which prefer a nutrient-rich
17 environment.

18 XX

19 It has not been demonstrated that there will be a significant
20 measureable oxygen depletion resulting from the accumulation of
21 organic material. While abrupt resuspension of sediments might occur
22 due to high currents or other disturbances, conditions at the site are
23 unlikely to be maintained long enough to cause dissolved oxygen
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1 concentrations to be reduced to levels which would adversely affect
2 fish or other organisms in the water.

3 The project's location complies with the Interim Guidelines'
4 criteria for safe distances from "habitats of special significance."
5 There is no critical habitat in the vicinity, and none within the
6 1500 foot minimum under the Interim Guidelines.

7 Appellants have not demonstrated that significant adverse impacts
8 will occur to aquatic life or benthic communities.
9

10 Fish Disease and Antibiotic Use

11 XVIII

12 Viral hemorrhagic septicemia (VHS) has been a cause of heightened
13 concern recently in Washington State. VHS virus was recently
14 detected in chinook and coho salmon at two hatcheries. As a
15 consequence the Washington Department of Fisheries (WDF) has sampled
16 all private salmon net pen facilities in Puget Sound. No VHS has been
17 detected at any aquatic salmon net pen operations in Washington.

18 Permittee's own record in obtaining disease-free salmonid eggs
19 and supplying Atlantic salmon to other net pen operations has been
20 admirable. These fish have always been certified disease free.

21 Appellants have not proven that the project is likely to cause
22 fish diseases among the wild populations.
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XIX

To control bacterial infections at the net pens, antibiotics approved by the U.S. Food and Drug Administration and WDF will be specially ordered and incorporated into the feed. Antibiotics will be typically used two times per year, each with a ten day treatment. Antibiotic use also requires notice to and approval by the Mason County Health Department. Fish will also be vaccinated in an effort to cut down antibiotic use. Fish growers have a disincentive to use antibiotics since its use retards the salmon's growth.

The use of antibiotics on a short-term basis may cause some drug-resistant fish bacteria to occur in the aquatic environment.

Appellants, however, have not proven that this use of antibiotics will have a significant adverse effect on aquatic life, or adversely affect human health.

XXIII

Aesthetics, Noise and Odor

A major criteria of site selection was to minimize adverse impacts on nearby residences. The property adjacent to the net pen site has no residences and is currently in commercial forest production. The owner, Manke Lumber Company, submitted a letter to Mason County supporting the Swecker project. The net pen facility cannot be seen from the existing residences on Hartstene Island. The nearest residence is about 1,625 feet away. It is on top of a bluff,

1 not oriented toward the net pens, and has no view of the facility due
2 to vegetation. The appellants use their property, north and south of
3 the net pens for hiking, rest and relaxation. The net pens will be
4 visible from these beaches. The pens will also be visible from boats.

5 Residences on the opposite side of Dana Passage in Thurston
6 County are located between 4,900 and 7,500 feet away. At this
7 distance, the facility has no adverse visual impact being barely
8 discernible as a line on the water. The evidence also appears to
9 indicate that beyond 2,400 feet salmon net pen facilities have not had
10 adverse effects on real estate values.

11 The potential for future homes on Hartstene Island with a clear
12 view of the net pens is somewhat limited. The lumber company property
13 immediately adjacent, as well as land north and south, is
14 characterized by a somewhat unstable bluff, ranging from 40 feet to
15 100 feet high. It is likely that future residences would have to be
16 set-back from the bluff's edge. Also, existing vegetation along the
17 bluff would likely be retained for bluff stability. This vegetation
18 would further block views of the project, particularly in the spring
19 and summer.

20 Noise impacts will be minimized due to conditions prohibiting
21 permanent generators and amplified devices. Water pumps will be
22 limited to use from 8 a.m. to 5 p.m. and shall have
23 better-than-original mufflers.

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1 Nets from the pens will be dried in the open air one at a time.
2 Given this situation, appellants have not proven significant adverse
3 odors will occur.

4 We find overall that appellants have not proven that the project
5 will have significant adverse impact on aesthetics, noise, or odors.

6 XXI

7 Navigation and Use Conflicts

8 The effect of the proposed development on navigation must be
9 considered in the context of the size and configuration of the
10 proposal and the extent of the surrounding waters. The distance from
11 Dana Passage to Johnson Point is about 1.50 miles in the area of the
12 proposed net pen facility. The net pens will be 745 feet from the
13 Hartstene Island shoreline and will affect a total surface area,
14 measuring from all outer buoys, of about 2.59 acres. The pens will be
15 marked by navigation aid lights and shown on navigational charts as
16 required by the U.S. Coast Guard.

17 Dana Passage is used by commercial vessels, including tugs,
18 barges, log rafts, fishing vessels and lumber ships that are primarily
19 transiting between Olympia and ports in Northern Puget Sound. The
20 shipping lane utilized by these vessels lies in the center of Dana
21 Passage and does not pass in close proximity to the net pen site. The
22 net pen facility is not likely obstruct commercial navigation in Dana
23 Passage.

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1 Dana Passage is also used by recreational vessels for fishing,
2 cruising and other purposes. Although some recreational fishing for
3 cutthroat trout occurs in the near-shore area, the site is not a
4 particularly productive or a popular sports fishing location for
5 salmon or bottomfish. Most recreational fishing in the area occurs at
6 Johnson Point, Anderson Island, Itsami Ledge and other locales away
7 from the site. There was no evidence presented that the net pen area
8 provided any kind of safe harbor for small craft. The visual impact
9 from boats will be of limited duration and occupy a small segment of
10 the view. The pens are not particularly obtrusive, for they lie
11 relatively low in the water. In sum, the impacts on recreational
12 boating will be minor.

13
14 XXV

15 Monitoring and Conditions

16 Monitoring is incorporated in the shoreline permit, as approved
17 by Mason County and DOE. See Finding of Fact IV, above.

18 The following conditions were stipulated to by permittee Swecker
19 at the SHB hearing, and will further mitigate any potential impacts of
20 the project:

- 21 1. The project shall not use automatic feeding machines
22 unless and until there is evidence that the food
conversion ratio is better than from hand feeding.
- 23 2. Permittee Swecker shall participate in a Sea Grant
24 Study for water quality, which is scheduled for three
25 years and will monitor ambient nitrogen, phosphorus,
dissolved oxygen, phytoplankton species, and other
parameters, so long as that study is funded and undertaken
by the study proponents.

1 Swecker's voluntary participation in the Sea Grant Study will
2 cost Swecker approximately \$30,000 per year for each of the three
3 study years.

4 XXVI

5 Any Conclusion of Law deemed a Finding of Fact is hereby adopted
6 as such. From these Findings of Fact, the Board makes these

7 CONCLUSIONS OF LAW

8 I

9 Appellants have the burden of proof. The Board reviews the
10 proposed development for consistency with the Shoreline Management Act
11 and the Mason County Shoreline Master Program. See,
12 RCW 90.58.140(2)(b). Further, the Board reviews for compliance with
13 the State Environmental Policy Act ("SEPA") including Mason County's
14 issuance of a determination of nonsignificance ("DNS"), Chapter 43.21C
15 RCW and WAC 461-08-175-(2)(a).

16 The Board previously granted partial Summary Judgment to
17 respondents, upholding Mason County's procedural compliance with SEPA
18 in its issuance of the DNS and SEPA Addendum. "Order".

19 II

20 Appellant's contention that the DNS violates SEPA is without
21 merit. The DNS determination is to be accorded substantial weight.
22 RCW 43.21C.090. Viewing the evidence as a whole, we conclude the DNS
23 was proper. Appellants have not proven that the net pen operation is
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1 an action which will significantly adversely affect the quality of the
2 environment. RCW 43.21C.030 and WAC 197-11-330. Neither has it been
3 demonstrated that there is a reasonable likelihood that the project
4 will have more than a moderate adverse effect on the environment. WAC
5 197-11-794.

6 III

7 The SMA sets forth a comprehensive policy on the shorelines of
8 this state at RCW 90.58.020, which includes the following preferences
9 for shorelines of state-wide significance:

- 10 1) Recognize and protect the state-wide interest
11 over local interest;
- 12 2) Preserve the natural character of the shoreline;
- 13 3) Result in long term over short term benefit;
- 14 4) Protect the resources and ecology of the
15 shoreline;
- 16 5) Increase public access to publicly owned areas of
17 the shoreline;
- 18 6) Increase recreational opportunities for the
19 public in the shoreline;
- 20 7) Provide for any other element as defined in RCW
21 90.58.100 deemed appropriate or necessary.

22 The SMA further states at RCW 90.58.020:

23 . . . end uses shall be preferred which are
24 consistent with control of pollution and prevention
25 of damage to the natural environment, or are unique
26 to or dependent upon use of the state's shoreline.

27 We conclude that the proposal is consistent with the above SMA policies.

1 Net pen salmon rearing, like other forms of aquaculture, is a
2 water-dependent use. It serves a state-wide interest through the
3 production of food for a broader market. Jamestown Klallam v. Clallam
4 County, SHB Nos. 88-4 and 88-5 (1989). Long-term benefit for the
5 people of the State will be realized by food production if the project
6 is successful. A bond is required to ensure the removal of the pens
7 should the project not be successful.

8 We conclude that project's likely long term benefits outweigh any
9 short term risks.

10 IV

11 Any development would to some degree impinge upon the natural
12 character of the shorelines. However, we have found the degree of
13 intrusion at this location not to be significant. The aesthetics of
14 the natural scene will not be significantly degraded, and disruption of
15 natural systems have not been shown to be significant. The natural
16 resources and ecology of the shoreline will be further protected by the
17 conditions built into the permit.

18 Neither public access nor recreational uses have been shown to be
19 significantly adversely affected by this project at this location.

20 In sum, we conclude that no violation of RCW 90.58.020 has been
21 shown.

22 V

23 There has not been any improper segmentation of the project since
24 no land-based development within the shoreline is proposed for support
25

1 of the net pen.

2 VI

3 The parties have stipulated that the version of the MCSMP adopted
4 on August 6, 1975, and amended on December 18, 1975, applies to the
5 Swecker application. The project site is located in a "Natural
6 Environment" under the MCSMP. The MCSMP sets forth specific
7 aquaculture use regulations at Section 7.16.020. For aquaculture
8 developments located in a Natural Environment, the following use
9 regulations for both the Rural and Natural Environments are relevant:

10 B. Rural Environment

- 11 1. Shoreline developments adjacent to unique areas
12 especially suitable for aquaculture shall practice
13 strict pollution control procedures to insure
14 aquaculture capabilities.
- 15 2. An aquacultural activity shall be considered to
16 include not only such activities on or under the
17 water, but shall also include associated necessary
18 structures which are land based.
- 19 3. Aquacultural enterprises shall be located in areas
20 where the navigational access of commercial traffic
21 is not significantly restricted.

22 [. . .]

- 23 5. Floating aquaculture enterprises shall be
24 encouraged to locate in areas that provide natural
25 protection from extreme forces of current, winds
and waves, and shall be allowed outright in the
following specific locations: . . . [The project
does not lie within any of the specified waters.]
- 26 6. Floating aquaculture enterprises may be
conditionally allowed in all other marine waters of
Mason County subject to review of the Administrator
and/or the Shoreline Advisory Board.

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- 1 7. Floating aquaculture structures shall not unduly
2 detract from the aesthetic qualities of the
3 surrounding environment.
4 8. The culture of food fish, shellfish, or other
5 aquatic animals by private interests for commercial
6 purposes requires a permit from the Washington
7 Department of Fisheries.

8 [. . .]

9 D. Natural Environment

- 10 1. Aquaculture and harvesting of marine plants and
11 animals is permitted, provided that the natural
12 ecology of the area is not significantly altered.
13 2. All Rural Environment use regulations shall apply
14 in this environment.

15 MCSMP, Section 7.16.020.

16 We conclude that the project is consistent with these MCSMP
17 aquaculture use regulations for the reasons earlier recited. In
18 addition, we note that B.5 uses the phrase "shall be encouraged to
19 locate in areas that provide natural protection . . . " Such language
20 is permissive.

21 VII

22 The project was required to obtain a conditional use permit under
23 the MCSMP. Section 7.28.010 of the MCSMP states that conditional use
24 permits will be granted only after the applicant can demonstrate all
25 of the following:

- 26 A. The use will cause no unreasonably adverse effects
27 on the environment or other uses.

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- 1 B. The use will not interfere with public use of
2 public shorelines.
- 3 C. Design of the site will be compatible with the
4 surroundings and the regulations set forth in this
5 ordinance.
- 6 D. The proposed use will not be contrary to the
7 general intent of this ordinance.

8 MCSMP, Section 7.28.010.

9 We conclude that the project meets all of the foregoing
10 requirements for a conditional use permit under the MCSMP, based upon
11 our previous recitals.

12 In sum, no contravention of the MCSMP has been shown.

13 VIII

14 Any Finding of Fact deemed a Conclusion of Law, is hereby adopted
15 as such. From these Conclusions of Law, the Board enters this:
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ORDER

The shoreline substantial development and conditions use permits issued to Daniel P. Swecker and Swecker Sea Farms as further conditioned at Finding of Fact XXI, are AFFIRMED.

DONE at Lacey, Washington, this 13th day of July, 1989.

SHORELINES HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Presiding

Wick Dufford
WICK DUFFORD, Chairman

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

Nancy Burnett
NANCY BURNETT, Member

Les Eldridge
LES ELDRIDGE, Member

Gordon F. Crandall
GORDON F. CRANDALL, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

SHB NO. 88-38

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF SHORELINE
PERMITS ISSUED BY MASON COUNTY
TO SWECKER SEA FARMS,

CLEAN UP SOUTH SOUND ("CUSS"),

Appellant,

and FRANK DOLESHY,

Intervenor-Appellant,

v.

DANIEL P. SWECKER, SWECKER SEA
FARMS, MASON COUNTY and State
of Washington, DEPARTMENT OF
ECOLOGY,

Respondents,

and

DEPARTMENT OF AGRICULTURE and
DEPARTMENT OF NATURAL RESOURCES,

Intervenors-Respondents.

SHB No. 88-38

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT
TO RESPONDENTS

1 The case involves a request for review of Mason County and the
2 State of Washington Department of Ecology's approval of shoreline
3 substantial development and conditional use permits for salmon net
4 pens in Dana Passage east of Hartstene Island.

5 On February 10, 1989, appellant Clean Up South Sound ("CUSS")
6 filed a Motion for Summary Judgment. On February 13, 1989,
7 respondents Daniel P. Swecker and Swecker Sea Farms ("Swecker") filed
8 a Cross Motion for Partial Summary Judgment. Appellant's response was
9 filed February 23, 1989. On March 6, 1989, the Shoreline Hearings
10 Board heard oral argument by telephone. The SHB members were: Judith
11 A. Bendor (presiding), Wick Dufford (chairman), Harold S. Zimmerman,
12 Nancy Burnett, Gordon F. Crandall and Robert C. Schofield. Attorney
13 Robert R. Meinig of Peter Eglick and Associates (Seattle) represented
14 appellants CUSS. Appellant Frank Doleshy appeared pro se. Attorneys
15 Thomas A. Goeltz and Richard W. Elliot of Davis, Wright
16 (Seattle/Bellevue) represented respondents Swecker.

17 I. MATERIALS CONSIDERED

18 The following materials were considered in ruling on these
19 motions:

20 1. CUSS' Motion and Memorandum in Support of Summary Judgment,
21 February 10, 1989, and

22 a. Declarations of Robert R. Meinig, Ernest Chaffee,
23 Henry G. Gay and documents attached thereto.
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25
26

1 2. Swecker's Motion and Memorandum in Support of Partial Summary
2 Judgment, February 13, 1989, and

3 a. Declaration of Tim Tynan;

4 b. Certified copy of Mason County record of proceedings on
5 shoreline permit application No. 88-03, Swecker Sea Farms
6 ("Record");

7 c. Certified copy of Mason County Shoreline Master Program
8 and ("MCSMP") and SEPA ordinance;

9 d. Declaration of Mason County official regarding May 31,
10 1988 hearing;

11 3. CUSS Reply Memorandum with Declaration of Jerome Rauen and
12 documents attached thereto, February 23, 1989; and

13 4. The appeal of the permit; and

14 5. Pre-Hearing Order issued November 10, 1988 as amended
15 December 1, 1989 listing the legal issues.

16 II. LEGAL ISSUES PRESENTED

17 CUSS moved for Summary Judgment on the basis that:

18 A. There had not been substantial compliance with the
19 Shoreline Management Act because:

20 1. Mason County did not publish a notice of the
21 permit application in a newspaper of general circulation
in Thurston County;

22 2. The notice that was published did not
23 sufficiently describe the project's location;

24 3. The County's public hearing notice was inadequate;
25 and that invalidation of the permit was required.

1 B. The DNS public notice was insufficient under SEPA for
2 the same reasons as above;

3 C. Mason County's failure to hear more than one DNS
4 appeal required reversal;

5 D. The County's SEPA Addendum process violated SEPA;

6 E. A shoreline variance permit was required
7 necessitating remand.

8 Swecker's filed a cross-motion for summary judgment, and also
9 moved for Summary Judgment on the basis that:

10 F. The Board had no jurisdiction over whether a State
11 waste and/or NPDES permit were required;

12 G. The Board had no jurisdiction over SEPA procedural
13 issues.

14 Having reviewed the foregoing materials and read and heard counsel's
15 contentions, the Board ruled on March 6, 1989 (orally and by letter)
16 that Swecker prevailed on its Cross Motion on Issues A.1, 2, 3; B; D;
17 and E; and that the Board did not have jurisdiction over the waste
18 discharge permit issue (Issue F). We ruled that Mason County's
19 failure to hear more than one DNS appeal did not require remand (Issue
20 C.). The Board denied Swecker's Motion on SEPA procedure (Issue G).
21 The hearing on the merits remained scheduled to begin April 7, 1989.

22 This written order confirms that ruling:

23 III. UNDISPUTED FACTS

24 1. On January 25, 1988, Swecker submitted a shoreline permit
25 application to Mason County, along with an environmental checklist and

1 attached supplemental information, for construction of a floating
2 salmon net pen facility. The project's location was described by
3 latitude and longitude, and by a map attached to the environmental
4 checklist. There was newspaper coverage of the application in The
5 Olympian, a newspaper of general circulation in Thurston County, which
6 included a map showing the project's location.

7
8 2. Notice of the shoreline permit application was published in
9 the legal newspaper of Mason County, The Shelton-Mason County Journal,
10 on February 11, 1988 and on February 18, 1988. This paper has general
11 circulation in that County, and also has some Thurston County
12 subscribers. These notices described the project's location by
13 longitude and latitude, within Case Inlet.

14 The notice said that:

15 Written comments must be received by March
16 18, 1988.

17 A public hearing will be held on this permit
18 request Contact this office for date and time
19 of hearing (206-426-5593).

20 The notice further announced that:

21 A determination of nonsignificance was
22 issued on February 11, 1988 under WAC
23 197-11-340. Written comments regarding this
24 determination must be received by February 29,
25 1988.

26 Project application notices were also posted in six locations
27 (i.e., on a buoy at the project center point, four on Hartstene Island
and one at the Shelton Post Office).

1 3. Mason County received numerous comments on the DNS, including
2 comments from four state agencies (Departments of Ecology, Parks and
3 Recreation Commission, Fisheries, and Wildlife), the Thurston County
4 Planning Department, and the Squaxin Tribe. None of these public
5 agencies or the Tribe suggested that the DNS was improper, nor stated
6 that an environmental impact statement should be prepared.

7 Mason County also received comments on the DNS and the permit
8 application from seven organizations. Written comments were also
9 received containing a total of fifty-eight individual signatures.
10 Numerous signatures were from Thurston County. The remainder were
11 predominantly from Mason County. The vast majority of these comments
12 expressed concern about the project and some requested the preparation
13 of an Environmental Impact Statement ("EIS").

14 4. On April 13, 1988, Mason County issued a SEPA Addendum which
15 imposed 15 project conditions which were to be part of the project as
16 it proceeded through the County's shoreline project application
17 hearing and review process. The SEPA Addendum was mailed to all SEPA
18 agencies with jurisdiction and to all persons and organizations which
19 had commented on the DNS. The Addendum stated that there was no
20 comment period provided pursuant to WAC 197-11-625.

21 5. Two written appeals of the DNS were filed, including one from
22 a member of CUSS. Petitions were also filed calling for a moratorium
23 on net pens. At a 5/31/88 Mason County Commissioners' public meeting
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1 to consider the DNS appeals, the Commissioners allowed 30 minutes for
2 oral presentations by the DNS disputants and then 30 minutes for the
3 project proponents. The parties then each had 5 minutes for
4 rebuttal. Staff presented its views on the DNS. The Board then
5 unanimously voted to uphold the DNS with the 15 conditions.
6

7 6. Thereafter, Swecker's shoreline permit application was
8 reviewed by Mason County staff, was considered at two hearings by the
9 County's Shoreline Advisory Board and was heard at a public session by
10 the Mason County Board of Commissioners on July 19, 1988. Project
11 opponents and proponents made statements. The Commissioners
12 unanimously approved the project permit, adding a 16th condition on
13 littoral drift and sedimentation rate monitoring.

14 7. The nearest Thurston county residence to this project is
15 approximately 4,900 feet away, almost a mile.

16 8. As a result of this project, no development is proposed in
17 the shorelines of Thurston County. Worker access to the facility and
18 the shipment of fish and materials will be from Zittel's Marina in
19 Thurston County. Swecker will use the marina's existing facilities
20 such as the parking lot, boat ramp, and boat lift, and moorage slips
21 for support of the net pens. Swecker's activities are the kind of
22 activities ordinarily carried on in an existing commercial marina. No
23 construction or exterior alteration of structures, and no filling,
24 dredging, or dumping will occur as a result of Swecker's access. Fish
25

1 processing will be done well inland at Swecker's Tumwater facility in
2 Thurston county.

3 9. The net pen project includes a warming (security) hut, 10
4 feet by 25 feet, by 10 feet high, on a platform barge. The hut is
5 physically attached to and movable with the floating net pen facility
6 itself.

7 IV. CONCLUSIONS OF LAW

8 1. We conclude that notice was not required in Thurston County
9 under the SMA or the MCSMP. The SMA requires notice of permit
10 application be published in "a newspaper of general circulation within
11 the area in which the development is proposed." RCW 90.58.140(4)(a)
12 emphasis added. WAC 173-14-070 and MCSMP .12.080 are to the same
13 effect. The area in which the project is proposed is Mason County.
14 Undisputed Facts 7 and 8. There are no serious impacts alleged to
15 occur in Thurston County "over and above" those identified to occur in
16 Mason County. See Nisqually Delta Assoc. v. Du Pont, 103 Wn.2d 720,
17 696 P.2d 1222 (1985).

18 2. We conclude that under the SEPA and the Mason County's
19 Environmental Ordinance, notice was not required in Thurston County.
20 The SEPA regulation at WAC 197-11-510 states in pertinent part:

21 WAC 197-11-510 Public notice. (1) When these
22 rules require notice to be given under this
23 section, the lead agency must use reasonable
24 methods to inform the public and other agencies
25 that an environmental document is being prepared or
is available and that public hearing(s), if any,
will be held. The agency may use its existing
notice procedures.

1 Examples of reasonable methods to inform the
2 public are:

3 (a) Posting the property, for site-specific
4 proposals;

5 (b) Publishing notice in a newspaper of general
6 circulation in the county, city, or general area
7 where the proposal is located;

8 (c) Notifying public or private groups with
9 known interest in a certain proposal or in the type
10 of proposal being considered;

11 (d) Notifying the news media;

12 (e) Placing notices in appropriate regional,
13 neighborhood, ethnic, or trade journals; and/or

14 (f) Publishing notice in agency newsletters
15 and/or sending notice to agency mailing lists
16 (either general lists or lists for specific
17 proposals or subject areas).

18 (2) Each agency shall specify its method of
19 public notice in its SEPA procedures, 197-11-904
20 and 197-11-906. If an agency does not specify its
21 method of public notice or does not adopt SEPA
22 procedures, the agency shall use methods (a) and
23 (b) in subsection (1). [. . .]

24 We conclude that Mason County did provide notice complying with WAC
25 197-11-510(1)(a) and (b).

26 The County's Environmental Policy Ordinance No. 99-84 specifies
27 that:

 if public notice is required for a non-exempt
 license, the notice shall state whether a DS or DNS
 has been issued and when comments are due.

28 We conclude that the notice also complied with the Ordinance. See
29 Conclusion of Law 1.

30 3. We conclude that the notices that were published sufficiently
31 described the project's location so as to reasonably apprise interested
32 parties.

1 persons. Nisqually, supra; Barrie v. Kitsap County, 84 Wn.2d 579, 527
2 P.2d 1377 (1974). Posting of notices near the project added to the
3 published notice. The public hearing notice was adequate. The
4 notices requested interested persons to contact the County and
5 provided a telephone number.

6 In sum, we conclude that the notices provided were adequate under
7 the Shoreline Management Act, Chpt. 90.58 RCW, the MCSMP, SEPA, and
8 the County's SEPA Ordinance.

9 4. Although the County designated only one of the two DNS
10 appeals as the formal appeal, the second appellant was permitted to
11 speak during the DNS appeal hearing. The issues in this "second
12 appeal" were generally, if not entirely, covered by the first appeal.
13 The Board need not interpret RCW 43.21C.075(3) since error, if any,
14 would be harmless, based on the facts presented and the de novo
15 review of the Board on the question of SEPA compliance and whether a
16 DNS was proper.

17 5. Mason County's SEPA Addendum was not a withdrawal nor
18 reissuance of a DNS requiring a new comment period or recirculation of
19 the DNS. WAC 197-11-340. In essence, the County issued a modified
20 DNS based upon comments received. WAC 197-11-340(2)(f)) It was sent
21 to agencies with jurisdiction as well as to other interested persons.
22 Appellants cite no authority for their proposition that another
23 comment round is required on this modified DNS and we conclude that
24 none is necessary. See also, WAC 197-11-625(5).
25

1 5. The warming hut is not a permanent facility under the MCSMP
2 7.20.040(a), and therefore no shoreline variance permit is required.
3 See, Jamestown Klallam v. Clallam County, SHB Nos. 88-4 and 88-5,
4 (Order Granting Partial Summary Judgment; 1988).

5 6. The Shorelines Hearings Board does not have jurisdiction to
6 consider appellants' claim that a state and/or NDPES waste discharge
7 permit be required. RCW 90.58.180.

8 7. The Board concludes it does have jurisdiction over SEPA
9 procedural compliance. Southpoint Coalition v. Jefferson County, SHB
10 No. 86-47 (Order Granting Summary Judgment; 1987). The shoreline
11 permit system is:

12 Inextricably interrelated with and supplemented by the
13 requirements of the State Environmental Policy Act
14 (SEPA), chapter 43.21C RCW. Lassiter v. Kitsap County,
15 SHB No. 86-23, at 9 (1986), citing Sisley v. San Juan
16 County, 89 Wn.2d 78, 569 P.2d 712 (1977).

ORDER

Summary Judgment is GRANTED to respondent Swecker on Issues II. A
1, 2, 3; B, D, E and F.

Summary Judgment is GRANTED to appellants CUSS on II. G.

SO ORDERED this 13th day of July, 1989.

SHORELINES HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Presiding

Wick Dufford
WICK DUFFORD, Chairman

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

Nancy Burnett
NANCY BURNETT, Member

Gordon F. Crandall
GORDON F. CRANDALL, Member

Robert C. Schofield
ROBERT C. SCHOFIELD, Member

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT TO RESPONDENT

SHB No. 88-38

(11)